

1995

# State of Utah v. Ronnie C. Byrd : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH,	:	
	:	
Plaintiff/Appellee,	:	
	:	
v.	:	
	:	
RONNIE C. BYRD,	:	Case No. 950399-CA
	:	Priority No. 2
Defendant/Appellant.	:	

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**BRIEF OF APPELLANT**

Appeal from a final judgment and conviction for two counts of Unlawful Possession of a Controlled Substance, 3rd degree felonies in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1996), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy, Judge, presiding.

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**UTAH COURT OF APPEALS  
BRIEF**

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**JURISDICTIONAL STATEMENT**

This appeal is from a final judgment and conviction for two counts of Unlawful Possession of a Controlled Substance, 3rd degree felonies in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (Supp. 1996) (a copy of the judgment is attached hereto as Addendum A), in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Michael R. Murphy, presiding. Jurisdiction is conferred on this Court pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 1996).

**STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW**

The issues presented for review are as follows:

1. Whether the prosecutor's use during trial of Defendant/Appellant Ronnie C. Byrd's ("Byrd") post-arrest silence violated his right to remain silent and prejudiced his right to a fair trial.

**STANDARD OF REVIEW:** Because the issue concerns the violation of a constitutional right, it is a question of law with respect to which this Court will not defer in any degree to the trial court but will review the trial court's determinations for

correctness. State v. Pena, 869 P.2d 932, 936 (Utah 1994).

2. Whether the trial court erred in denying Byrd's motion for a new trial where the state breached its duty to supplement discovery responses relevant to Byrd's defense.

STANDARD OF REVIEW: A ruling denying a motion for a new trial will be reversed if the trial court abused its discretion. State v. Menzies, 845 P.2d 220, 224 (Utah 1992).

#### PRESERVATION OF ARGUMENT

At trial Byrd objected to the state's examination of an officer and the state's cross-examination of Byrd concerning Byrd's post-arrest silence during police interrogations. The examinations violated Byrd's Fifth Amendment and due process rights. Record on Appeal ("R.") at 169-87; 484; 528-30; 600-01; 659-60.

In addition, Byrd requested a new trial based on the state's introduction of surprise testimony that directly conflicted with earlier information provided by the state during pretrial discovery. (R. 169-87.) The surprise testimony compromised Byrd's credibility to the jury. (R. 169-87; 460-469.)

#### RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

The following rules, statutes and constitutional provisions will be determinative of the issues on appeal:

Utah Rules of Criminal Procedure 16 -- Discovery.

Utah Const. art. I, § 7.

Utah Const. art. I, § 12.



U.S. Const. amend. V.

U.S. Const. amend. XIV.

The text of those provisions is contained in the attached Addendum B.

#### **STATEMENT OF THE CASE**

##### **Nature of the Case, Course of Proceedings and Disposition in the Court Below.**

On October 14, 1993, Byrd was charged by Information with two counts of Unlawful Possession of a Controlled Substance, third degree felonies in violation of Utah Code Ann. § 58-37-8(2)(a)(i) (1953 as amended). (R. 7-8.) After Byrd engaged in pretrial discovery (R. 13-14), the jury trial commenced. (R. 68; 74-76; 265-671.) At the conclusion of the trial, the jury found Byrd guilty on both counts and Byrd requested a new trial raising the issues set forth herein. (R. 121-22; 169-87.) The trial court denied Byrd's request (R. 207-08) and entered a judgment sentencing Byrd to serve indeterminate, concurrent terms at the Utah State Prison not to exceed five years. (R. 201-02; 207-08.) Byrd is incarcerated at the Utah State Prison and appeals from the final judgment. (R. 209.)

#### **STATEMENT OF FACTS**

Prior to the trial in this matter, Byrd's counsel engaged in pretrial discovery, which included interviewing officers who arrested Byrd and investigated the events leading up to his arrest for two counts of unlawful possession of a controlled substance. (R. 13-14; 132.) Officer Thomas Scott Grant

("Grant") disclosed to defense counsel and testified at trial that on October 12, 1993, officers were engaged in a clandestine operation at Pioneer Park in Salt Lake City, Utah. (R. 357-66.) Grant observed the following events at the park through a telescope and video camera from the second floor of a building next to the park: a car pulled up to a curb along the park, a pedestrian approached the car, the car occupant(s) and the pedestrian apparently engaged in a conversation, the first pedestrian left, and a second pedestrian approached the car, twice handed items through the front passenger-side window of the car, and took what appeared to be cash from an occupant in the car. (R. 369-73.)

When the car pulled away and left the park Grant notified other officers that he had observed a drug transaction between a pedestrian and the front passenger of the car and he described the car to the officers. (R. 410; 475-77.) Officers Martin Kaufman ("Kaufman") and David Thurgood ("Thurgood") followed the car for a number of blocks from Pioneer Park, briefly lost it in traffic, located it again, and initiated a stop of the car. (R. 410-12; 477-480.) The officers testified that while they observed the car, none of the occupants made a furtive motion toward the floor of the car and/or toward the front passenger seat area. (R. 428-29; 414-15.)

Three individuals were in the stopped car. Byrd was in the front passenger seat. (R. 412-13.) Thurgood approached the car, asked Byrd to get out, lead him to an area away from the car and

arrested him. (R. 415; 481-83.)

After Byrd's arrest, Thurgood searched only the front passenger seat area of the car and found two items tucked under that seat. The items were later determined to be cocaine and heroine. (R. 416-18; 484-86.) During a pretrial interview Kaufman disclosed that he did not search any other area of the car and neither he nor Thurgood searched or arrested the other car occupants. (R. 419-22; 443-44; see also 445-47.) The officers allowed the other car occupants to drive away without being questioned or searched. (R. 415-16; 442-44; 486.)

The state and the officers did not supplement discovery responses or correct any misrepresentations that were provided to the defense during pretrial discovery concerning the events leading up to Byrd's arrest. (R. 420-22.) Thus, counsel for Byrd proceeded with a defense that (1) either the driver or the back-seat passenger, or both, were the actual parties to the alleged drug transaction (R. 343-50), and (2) the drugs found in the car belonged to the owner/driver or other occupant, and were placed in the car before the events at the park occurred. (R. 349-50; 461-62.) Byrd's counsel introduced the defense theory to the jury during opening statements, calling the attention of the jurors to evidence that would show there was no search of the car other than the right front passenger seat, that all three passengers would have had access to the only area of the car that was searched, and that the other two occupants were not questioned, searched, or investigated but were released shortly after the

officers stopped the car. (R. 348-50; see also 438-43.)

The defense was surprised at trial when Kaufman testified that he conducted an exhaustive search of the car after Thurgood completed his minimal search of the passenger area of the car. (R. 131-33; 416-17.) Such testimony served to compromise the defense's credibility to the jury and to invalidate the defense's theory and trial strategy. (R. 465-66.)

In addition, during the trial Thurgood testified on direct examination that immediately after Byrd was arrested, Thurgood advised Byrd of his rights per Miranda v. Arizona, 384 U.S. 436 (1966), and asked Byrd if he wanted to make a statement. (R. 483; 486-87.) According to Thurgood, Byrd said "yes," but "declined" to comment in response to police interrogations. (R. 483-88; 529-32.) Counsel for Byrd immediately objected on Fifth Amendment and constitutional due process grounds to the prosecution's line of questions concerning Byrd's refusal to respond to officers' questions and made a motion for a mistrial. (R. 528-29.) However, clear implications were already before the jury -- Byrd's silence and his failure to deny involvement in the alleged drug transaction implicated him in the charged offenses.

During Byrd's cross-examination, the prosecutor again raised the issue of Byrd's silence in the wake of the Miranda warnings. (R. 600-01.) The prosecutor asked Byrd the following:

(By the prosecutor) Q: Do you remember the officer testifying that when he gave you the Miranda warnings you said, "Yes I'll talk to you"?

(By Byrd) A: I remember him saying that.

Q: Do you remember him giving you the Miranda warnings?

A: I can't remember if he did or not.

Q: So it could have been or it could not have been; that's what you are saying?

A: I just know[,] I didn't talk to him.

Q: You certainly did not say anything to him about the driver buying these drugs, did you?

A: I didn't say anything about no drugs, period.

Q: And certainly you didn't want to protect these guys, did you?

(R. 600-01; 659-660.) Byrd's counsel made a request for a new trial based on prosecutorial misconduct in violation of Byrd's constitutional rights. (R. 171-87.) The jury found Byrd guilty on both counts of unlawful possession of a controlled substance (R. 662-63), and thereafter, the trial court denied Byrd's request. (R. 207-08.)

#### **SUMMARY OF THE ARGUMENT**

During trial, the state made repeated references to Byrd's post-arrest silence in the face of officer interrogations. The state made its first reference through the state's witness on direct examination, and the second reference through Byrd on cross-examination. References at trial to a defendant's post-arrest silence are violative of the Fifth and Fourteenth Amendments of the federal constitution and article I, sections 7 and 12 of the Utah constitution.

The state's duty to supplement information provided to the defense during pretrial discovery is ongoing and consistent with a defendant's right to a fair trial. In this matter, during pretrial discovery the state arranged for Byrd's counsel to interview Kaufman concerning the events surrounding Byrd's arrest. In preparing Byrd's defense, counsel relied on Kaufman's pretrial representations that the officers did not conduct a complete search of the car. At trial Kaufman's testimony contrasted with the information he provided to Byrd's counsel during pre-trial discovery. The state's failure to advise Byrd's counsel of the change in the officer's testimony compromised the defense's credibility to the jury.

#### **ARGUMENT**

**POINT I. THE STATE'S INTRODUCTION OF EVIDENCE IN ITS CASE-IN-CHIEF OF BYRD'S POST-ARREST SILENCE AND THE USE OF POST-ARREST SILENCE BY THE STATE DURING CROSS-EXAMINATION TO IMPEACH BYRD VIOLATED STATE AND FEDERAL CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITIONS AGAINST COMPULSORY SELF-INCRIMINATION.**

The Fifth Amendment to the federal constitution provides: "No person shall . . . be compelled in any criminal case to be a witness against himself." The Miranda warnings are a prophylactic means of safeguarding the Fifth Amendment rights, and require "that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to

interrogation." Doyle v. Ohio, 426 U.S. 610, 617 (1976).

Article I, section 12 of the Utah Constitution likewise provides that an accused "shall not be compelled to give evidence against himself."<sup>1</sup>

In Doyle, 426 U.S. at 610, the United States Supreme Court ruled that prosecutorial comment for impeachment purposes on a defendant's silence is violative of the Fifth Amendment and the due process provision of the federal constitution,<sup>2</sup> and is grounds for the reversal of a conviction. In that case, the prosecutor attempted to undercut the defendants' exculpatory explanation for a drug sale by asking them during cross-examination why they had not reported their version of the events to the officer at the time of their arrests. The Court held that use of the defendants' post-arrest silence after receiving Miranda warnings was impermissible. "Silence in the wake of [Miranda] warnings may be nothing more than the arrestee's exercise of [those] rights. Thus, every post-arrest silence is insolubly ambiguous because of what the state is required to advise the person arrested." Id. at 617.

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<sup>1</sup> In determining whether Byrd's rights under Article I, section 12 were violated, Byrd is not urging that the analysis under the Utah Constitution is different from an analysis under the federal constitution. See State v. Mace, 295 Adv. Rep. 44, 45 (Utah 1996).

<sup>2</sup> The Fourteenth Amendment to the federal constitution provides, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ." Art. I, sec. 7 of the Utah Constitution guarantees fundamental fairness at trial, and for purposes of this appeal the analysis of that provision is not different from the analysis under the federal counterpart.

Although Miranda warnings contain no express assurance that silence will carry no penalty, such an assurance is implicit to persons receiving the warnings. "[I]t would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id. at 618.

In State v. Wiswell, 639 P.2d 146 (Utah 1981), the Utah Supreme Court reversed a conviction where the prosecutor drew attention to the defendant's post-arrest silence. Id. at 147. Such conduct constituted prosecutorial misconduct.

In State v. Reyes, 861 P.2d 1055 (Utah Ct. App. 1993), this Court identified four factors that must be considered in determining whether post-arrest silence has prejudiced a defendant. The factors are the following:

(1) whether the jury would "naturally and necessarily construe" the comment as referring to defendant's silence; (2) whether there was overwhelming evidence of defendant's guilt; (3) whether the reference was isolated; and (4) whether the trial court instructed the jury not to draw any adverse presumption from defendant's decision not to testify.

Id. at 1057. Consideration of the factors in this matter compels the determination that the prosecutor's questions concerning and references to Byrd's post-arrest silence prejudiced Byrd.

During the state's case-in-chief, the prosecutor elicited testimony from Thurgood that he arrested Byrd, provided him with his rights per Miranda, and asked him if he wanted to talk. Byrd replied yes. However, in the face of police interrogations, Byrd declined to make a statement. (R. 483-88; 529-32.) In addition,



during Byrd's cross-examination, the prosecutor specifically questioned Byrd about his refusal at the time of the arrest to make a statement to officers. (R. 600-01.) The prosecutor's comments and questions specifically and clearly referred to Byrd's silence, thereby demonstrating prejudice under the first factor set forth in Reyes. The prosecutor engaged in the line of questions concerning Byrd's silence in order to impeach him and to highlight the fact that for whatever reason, Byrd declined to give the officers his version of the events on October 12, 1993. Byrd's refusal to talk to the officers could be seen as inconsistent with his defense that he was not the buyer in the transaction, and did not stash the drugs beneath the car seat.

With regard to the second factor in Reyes, the state's case was based on a video of an ambiguous exchange taking place at a distance through the passenger-side window of a car (R. 373; state's trial Exhibit 1), Grant's testimony that he observed from a distance an exchange of some kind (R. 369-73; 395-400), and Thurgood's incredible testimony that Byrd confessed to buying drugs. (R. 489-90.)

According to Thurgood, he transported Byrd to the jail, a distance of four blocks (R. 511), and as he "pull[ed] up to the jail doors" he initiated a conversation with Byrd, stating, "What's up, what's going on?" (R. 489-90.) Byrd allegedly responded to the small talk with a statement that he purchased drugs at Pioneer Park. (Id.) Thurgood did not reply to Byrd's alleged statement and made no attempt to preserve it. He simply

noted the alleged confession in his police report. (R. 516-19.) Byrd denied making any such confession. (R. 573-76.)

The confession evidence hinges on credibility; the remainder of the evidence against Byrd is inconclusive and not overwhelming. If the jurors concluded Byrd was not credible, their conclusion likely was based on the fact that Byrd did not defend himself to the officer during the post-arrest interrogation. Evidence of Byrd's post-arrest silence prejudiced him.

The danger is that the jury is likely to assign much more weight to the defendant's previous silence than is warranted. And permitting the defendant to explain the reasons for his silence is unlikely to overcome the strong negative inference that the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest.

U.S. v. Hale, 422 U.S. 171, 180 (1975). The jurors' conclusions in this case were based on their weighing of conflicting evidence -- Byrd's testimony versus Thurgood's testimony. Thus, the likelihood that the jurors were improperly influenced by the prosecutor's questions concerning Byrd's post-arrest silence is significant. Indeed, the jurors likely relied on that evidence to interpret and weigh Byrd's version of the events.

Under the third factor in Reyes, the Court considers whether the reference to the defendant's post-arrest silence was an isolated incident. In this case the prosecutor referred to the post-arrest silence both during the state's case-in-chief and during the defendant's case. The reference was not isolated.

With regard to the fourth factor in Reyes, during both the state's case-in-chief and Byrd's cross-examination, when the

prosecutor asked about Byrd's post-arrest silence, Byrd's counsel immediately requested a bench conference, made objections on constitutional grounds, and moved for a mistrial. (R. 528-29; 659-60; 171-87.) The trial court declined to consider the motion until after the jury commenced deliberations. (R. 657-58.) Although the trial court had the opportunity to admonish the jury to disregard the prosecutor's comments and the evidence concerning the post-arrest silence, the trial court failed to do so. The trial court should have taken some measure to ensure that the jury avoided, as far as possible, the fact that Byrd declined to respond to the officer's post-arrest interrogations. The trial court failed in this endeavor, thereby influencing the outcome of the case.

Use of Byrd's post-arrest silence for impeachment purposes created an inference of guilt and violated his due process rights and his protections against self-incrimination under the Fifth and Fourteenth Amendments of the United States Constitution and art. I, secs. 7 and 12 of the Utah Constitution.

When a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony . . . . Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial.

United States v. Hale, 422 U.S. 171, 183 (1975) (J. White,

concurring). It is impossible to know the full impact on the jury of the prosecutor's comments concerning Byrd's post-arrest silence. The evidence against Byrd was inconclusive and conflicting, as set forth above in connection with the second factor in Reyes. The jury likely drew an unfavorable inference from Byrd's post-arrest silence. It is reasonably likely that without the occurrence of prosecutorial misconduct, the results would be different. Because Byrd was prejudiced by the comment, his conviction must be vacated.

POINT II. THE STATE FAILED TO PROVIDE CONTINUING  
DISCOVERY AND TO CORRECT MISINFORMATION REPORTED TO THE  
DEFENSE BY THE INVESTIGATING OFFICER.

Rule 16, Utah Rules of Criminal Procedure, "imposes a duty on the prosecutor to provide discovery material to the defense on request. This duty is continuous and applies whether a prosecutor is responding to a court order or is voluntarily producing information." State v. Archuleta, 850 P.2d 1232, 1242-43 (Utah), cert. denied, 126 L.Ed.2d 427 (1993) (prosecutor violated duty by failing to disclose that substance of witness' testimony had changed on the eve of trial from that contained in pretrial interviews); State v. Kallin, 877 P.2d 138, 143 (Utah 1994) (the state has the duty to comply with discovery requests fully and forthrightly).

[W]hen the prosecution chooses to respond voluntarily to a request under subsection (a)(5) [of the Utah Rules of Criminal Procedure] without requiring the defense to obtain a court order, considerations of fairness require that the prosecution respond to the request in a manner that will not be misleading.

\* \* \*

[W]hen the prosecution agrees to produce any of the

material requested, it must continue to disclose such material on an ongoing basis to the defense. Therefore, if the prosecution agrees to produce certain specified material and it later comes into possession of additional material that falls within that same specification, it has to produce the later-acquired material.

State v. Knight, 734 P.2d 913, 916 (Utah 1987).

For discovery purposes, "[i]nformation known to police officers working on a case is charged to the prosecution since the officers are part of the prosecution team. Neither the prosecutor nor officers working on a case may withhold exculpatory evidence or evidence valuable to a defendant." State v. Shabata, 678 P.2d 785 (Utah 1984).

Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure.

Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964).

In this matter, Byrd made a timely request for the discovery of all police reports and investigations. The state provided reports prepared by Thurgood and represented that Kaufman did not submit written papers in connection with the incident. Thus, the state arranged for defense counsel to interview Kaufman by telephone two days before the trial. (R. 465-68.) Kaufman provided defense counsel with a telephonic pretrial statement concerning the search of the car -- he stated he did not search the car. (R. 419-20.) At trial, he testified in a manner that

was materially inconsistent with his earlier, pretrial statements -- he testified that he searched the entire car. (R. 416-17.)

Kaufman admitted that he failed to advise defense counsel of the material change in his testimony. (R. 132.)

Because Kaufman and the state failed to notify defense counsel of the material change, counsel made representations during opening statements based on Kaufman's pretrial misrepresentations. During the state's examination of Kaufman at trial it became clear that defense counsel presented a theory to the jury that did not conform to the evidence, thereby directly placing the credibility of the defense in issue. Had the state provided Byrd's counsel with a summary of Kaufman's changed statement, Byrd's counsel could have altered and salvaged the defense, by focusing solely on the state's failure to investigate and search the other occupants of the car, without putting the credibility of the defense in issue. Byrd's entire trial strategy was thwarted by the state's failure to disclose the change in Kaufman's testimony. The state's failure to update and supplement the discovery information prior to trial hampered Byrd's ability to fully and fairly prepare for trial.

Although the trial court had at its disposal the power to obviate any prejudice resulting from the state's breach of the discovery rules, the trial court in this matter failed to take curative measures or to impose sanctions against the state. Utah R. Crim. P. 16 (g) ("If at any time during the course of the proceedings it is brought to the attention of the court that a

party has failed to comply with this [discovery] rule, the court may . . . enter such [order] as it deems just under the circumstances"). The trial court could have barred the state from presenting the conflicting evidence, admonished the jury to disregard Kaufman's testimony where it was inconsistent with the defense's theory of the case, or granted a new trial. Instead, the trial court permitted the state to present the testimony.

The state's conduct undermined the purpose of the discovery rules, that is the elimination of unnecessary technicalities and the removal of the element of surprise or trickery so that the parties and the finder of fact could determine the facts and resolve the issues directly, fairly and as expeditiously as possible. See Ellis v. Gilbert, 429 P.2d 39 (Utah 1967).

[A] criminal proceeding is more than an adversarial contest between two competing sides. It is a search for truth upon which a just judgment may be predicated. Procedural rules are designed to promote that objective, not frustrate it. When a request or an order for discovery is made pursuant to [the discovery rules], a prosecutor must comply. To meet basic standards of fairness and to ensure that a trial is a real quest for truth and not simply a contest between the parties to win, a defendant's request for information which has been voluntarily complied with, or a court order of discovery must be deemed to be a continuing request. And even though there is no court-ordered disclosure, a prosecutor's failure to disclose newly discovered inculpatory information which falls within the ambit of [the discovery rules], after the prosecution has made a voluntary disclosure of evidence might so mislead defendant as to cause prejudicial error.

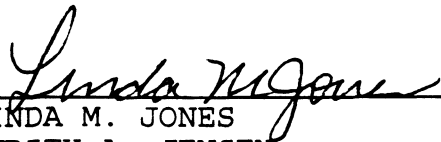
State v. Carter, 707 P.2d 656, 662 (Utah 1985). The supplemental discovery information was improperly withheld from the defense in violation of Rule 16(a), Utah Rules of Criminal Procedure.

A review of the record reflects that if the information had been provided to the defense, counsel could have prepared and presented the case to the jury in a manner that was consistent with the evidence presented at trial, without drawing attention to issues that later proved to be unsupported by the evidence. The defense was not given the opportunity to fully and fairly prepare its case. In addition, Byrd's counsel was forced to abandon the defense theory of the case as presented to the jury in opening statements, and to restructure the defense theory in the middle of trial, thereby compromising the integrity of Byrd's defense. The state's failure to inform the defense of Kaufman's change in testimony prejudiced Byrd. Salt Lake City v. Reynolds, 849 P.2d 582, 585 (Utah Ct. App. 1993).

#### CONCLUSION

Inasmuch as the prosecutor engaged in misconduct by making reference to Byrd's post-arrest silence, and failed to advise defense counsel that a witness' testimony had changed since discovery, Byrd is entitled to a vacation of the conviction and a new trial void of misconduct.

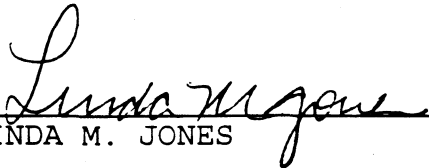
SUBMITTED this 6th day of September, 1996.

  
\_\_\_\_\_  
LINDA M. JONES  
JUDITH A. JENSEN  
Attorney for Defendant/Appellant



CERTIFICATE OF DELIVERY

I, LINDA M. JONES, hereby certify that I have caused to be hand-delivered eight copies of the foregoing to the Utah Court of Appeals, 230 South 500 East, Suite 400, Salt Lake City, Utah 84102, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, Sixth Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 6<sup>th</sup> day of September, 1996.

  
LINDA M. JONES

DELIVERED this \_\_\_\_\_ day of \_\_\_\_\_, 1996.

\_\_\_\_\_

## ADDENDUM A

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

APR 10 1995

THE STATE OF UTAH,

SALT LAKE COUNTY  
By DA S. 10/11  
Deputy Clerk

Plaintiff,

JUDGMENT, SENTENCE  
(COMMITMENT)

vs.

Ronnie C. Byrd  
DOB 1-20-52

Defendant.

Case No. 931901837  
Count No. I  
Honorable Michael R. Murphy  
Clerk MGS  
Reporter Gayle Campbell  
Bailiff Gene Unsworth  
Date 4-10-95

☐ The motion of \_\_\_\_\_ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☒ a jury; ☐ the court; ☐ plea of guilty; ☐ plea of no contest; of the offense of Unlawful Possession of a controlled substance, a felony of the 3 degree, ☐ a class \_\_\_\_\_ misdemeanor, being now present in court and ready for sentence and represented by J. Jensen, and the State being represented by W. Ellett, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

- ☐ to a maximum mandatory term of \_\_\_\_\_ years and which may be for life;  
☒ not to exceed five years;  
☐ of not less than one year nor more than fifteen years;  
☐ of not less than five years and which may be for life;  
☐ not to exceed \_\_\_\_\_ years;  
☐ and ordered to pay a fine in the amount of \$ \_\_\_\_\_;  
☐ and ordered to pay restitution in the amount of \$ \_\_\_\_\_ to \_\_\_\_\_

- ☒ such sentence is to run concurrently with count II  
☐ such sentence is to run consecutively with \_\_\_\_\_  
☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) \_\_\_\_\_ are hereby dismissed.

- ☐ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of \_\_\_\_\_, pursuant to the attached conditions of probation.

- ☒ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.

☒ Commitment shall issue Forthwith

DATED this 10 day of April, 1995

APPROVED AS TO FORM:

Michael R. Murphy  
DISTRICT COURT JUDGE

Defense Counsel

Deputy County Attorney

Page 1 of 2

IN THE THIRD JUDICIAL DISTRICT COURT  
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

APR 10 1995

THE STATE OF UTAH,

By SALT LAKE COUNTY  
SNK Deputy Clerk

Plaintiff,

vs.

Ronnie C. Byrd  
DOB 1-20-52

Defendant.

JUDGMENT, SENTENCE  
(COMMITMENT)

Case No. 931901837  
Count No. II  
Honorable Michael R. Murphy  
Clerk MCS  
Reporter Gayle Campbell  
Bailiff Gene Unsworth  
Date 4-10-95

☐ The motion of \_\_\_\_\_ to enter a judgment of conviction for the next lower category of offense and impose sentence accordingly is ☐ granted ☐ denied. There being no legal or other reason why sentence should not be imposed, and defendant having been convicted by ☒ a jury; ☐ the court; ☐ plea of guilty; ☐ plea of no contest; of the offense of Unlawful possession of a controlled substance, a felony of the 3 degree, ☐ a class \_\_\_\_\_ misdemeanor, being now present in court and ready for sentence and represented by J. Jensen, and the State being represented by W. Elliott, is now adjudged guilty of the above offense, is now sentenced to a term in the Utah State Prison:

☐ to a maximum mandatory term of \_\_\_\_\_ years and which may be for life;

☒ not to exceed five years;

☐ of not less than one year nor more than fifteen years;

☐ of not less than five years and which may be for life;

☐ not to exceed \_\_\_\_\_ years;

☐ and ordered to pay a fine in the amount of \$\_\_\_\_\_;

☐ and ordered to pay restitution in the amount of \$\_\_\_\_\_ to \_\_\_\_\_

☒ such sentence is to run concurrently with Count I

☐ such sentence is to run consecutively with \_\_\_\_\_

☐ upon motion of ☐ State, ☐ Defense, ☐ Court, Count(s) \_\_\_\_\_ are hereby dismissed.

☐

☐ Defendant is granted a stay of the above (☐ prison) sentence and placed on probation in the custody of this Court and under the supervision of the Chief Agent, Utah State Department of Adult Parole for the period of \_\_\_\_\_, pursuant to the attached conditions of probation.

☒ Defendant is remanded into the custody of the Sheriff of Salt Lake County ☒ for delivery to the Utah State Prison, Draper, Utah, or ☐ for delivery to the Salt Lake County Jail, where defendant shall be confined and imprisoned in accordance with this Judgment and Commitment.

☒ Commitment shall issue Forthwith

DATED this 10 day of April, 19 95

APPROVED AS TO FORM:

Michael R. Murphy  
DISTRICT COURT JUDGE

Defense Counsel

Deputy County Attorney

## ADDENDUM B

## Rule 16. Discovery.

(a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:

- (1) relevant written or recorded statements of the defendant or codefendants;
- (2) the criminal record of the defendant;
- (3) physical evidence seized from the defendant or codefendant;
- (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense for reduced punishment; and
- (5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

(c) Except as otherwise provided or as privileged, the defense shall disclose to the prosecutor such information as required by statute relating to alibi or insanity and any other item of evidence which the court determines on good cause shown should be made available to the prosecutor in order for the prosecutor to adequately prepare his case.

(d) Unless otherwise provided, the defense attorney shall make all disclosures at least ten days before trial or as soon as practicable. He has a continuing duty to make disclosure.

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

(f) Upon a sufficient showing the court may at any time order that discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate. Upon motion by a party, the court may permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such an ex parte showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

(h) Subject to constitutional limitations, the accused may be required to:

- (1) appear in a lineup;
- (2) speak for identification;
- (3) submit to fingerprinting or the making of other bodily impressions;
- (4) pose for photographs not involving reenactment of the crime;
- (5) try on articles of clothing or other items of disguise;
- (6) permit the taking of samples of blood, hair, fingernail scrapings, and other bodily materials which can be obtained without unreasonable intrusion;
- (7) provide specimens of handwriting;
- (8) submit to reasonable physical or medical inspection of his body; and
- (9) cut hair or allow hair to grow to approximate appearance at the time of the alleged offense.

Whenever the personal appearance of the accused is required for the foregoing purposes, reasonable notice of the time and place of such appearance shall be given to the accused and his counsel. Failure of the accused to appear or to comply with the requirements of this rule, unless relieved by order of the court, without reasonable excuse shall be grounds for revocation of pre-trial release, may be offered as evidence in the prosecutor's case in chief for consideration along with other evidence concerning the guilt of the accused and shall be subject to such further sanctions as the court should deem appropriate.

Art. I

CONSTITUTION OF UTAH

**Sec. 7. [Due process of law.]**

No person shall be deprived of life, liberty or property, without due process of law.

**Sec. 12. [Rights of accused persons.]**

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

**[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section

1. [Citizenship — Due process of law — Equal protection.]
2. [Representatives — Power to reduce appointment.]
3. [Disqualification to hold office.]

Section

4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]
5. [Power to enforce amendment.]

**Section 1. [Citizenship — Due process of law — Equal protection.]**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Sec. 2. [Representatives — Power to reduce appointment.]**

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Sec. 3. [Disqualification to hold office.]**

No person shall be a Senator or Representative in Congress, or Elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.



**Sec. 4. [Public debt not to be questioned — Debts of the Confederacy and claims not to be paid.]**

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

**Sec. 5. [Power to enforce amendment.]**

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.